BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JESUS J. PINEDO Claimant	)	
VS.	)	Docket No. 1,054,818
MILLER PAVING & CONSTRUCTION, LLC Respondent	)	
AND	)	
SENTINEL INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier request review of the January 24, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Timothy A. Emerson of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 20, 2011, preliminary hearing and exhibit thereto; the transcript of the May 3, 2011, preliminary hearing and exhibits thereto; the transcript of the June 17, 2011, deposition of Bobby Darrell Rice; the transcript of the June 17, 2011, deposition of Quincy T.H. Maxwell and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

The ALJ found that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent and that respondent was provided with timely notice. Authorized medical treatment with Dr. Kenneth Jansson was awarded and respondent was ordered to pay medical expenses incurred by claimant as authorized treatment.

Respondent timely filed an application for Board review and raised these issues: (1) whether the ALJ erred in finding that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent; (2) whether the ALJ erred in awarding claimant medical treatment and temporary total disability (TTD) benefits;[1] and (3) whether "certain other defenses apply."[2] Respondent contends that the Order should be reversed and the claim denied.

Claimant maintains the Order should be affirmed in all respects.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was age 42 when he sustained his alleged accidental injury. He had been employed by respondent as a laborer for approximately three months. The principal activity required by claimant's job was digging with a shovel. Although he was required to work around construction equipment, his duties did not require him to operate such equipment.

At about 8:00 a.m. or 8:30 a.m. on September 2, 2010, claimant alleged he was injured when he was struck in the right knee by a backhoe. Claimant testified that he was standing to the left of the backhoe, between it and a tree. The machine was being operated by a co-worker, "Quince," to dig up an old gas main so it could be replaced. According to claimant the backhoe started "waving around and that was when the machine hit my knee and flipped me over and knocked me to the ground."[3] It was the backhoe's bucket which struck claimant's right knee. Claimant experienced pain in his right knee. After the fall, claimant landed on an adjacent sidewalk.

Claimant testified that the operator of the backhoe was looking right at claimant when he was struck with the bucket. After the incident Quince disembarked the backhoe to assist claimant. Claimant's supervisor, Dennis Menefee, saw claimant lying on the sidewalk and took claimant home. Claimant reported to work the next day, September 3, 2010, and talked with two "bosses,"[4] Scott Whelan and Bobby Darrell Rice. Mr. Rice took claimant to Immediate Medical Care Clinic, where he was seen by Dr. Hershberger.

---

[1] The preliminary hearing Order did not award TTD benefits.

[2] Application for Review at 1. Respondent briefs only the single issue of whether claimant sustained personal injury by accident arising out of and in the course of his employment.

[3] P.H. Trans. (May 3, 2011) at 7, 8.

[4] *Id.*, at 11.

Claimant testified that Mr. Rice told him to tell the doctor that claimant's injury was not work related. According to claimant, Mr. Rice instructed him to "make up something else," so workers compensation did not get involved.[5]

The history claimant provided to Dr. Hershberger was "Pt. was carrying wood down stairs missed a step and fell hitting his knee on a piece of pipe."[6] The treatment records dated September 3, 2010, indicate claimant denied his injury was work related. Claimant complained of right knee pain and swelling. X-rays of his right knee were within normal limits. The diagnosis was right knee contusion. Claimant was provided with pain medication and an ace wrap. Bobby Darrell Rice paid $229 with his personal credit card for claimant's office visit with Dr. Hershberger.

Claimant admitted at the preliminary hearing that the history he provided to Dr. Hershberger's office was not true.[7]

Claimant denied having any problems or injuries involving his right knee before September 2, 2010. Claimant also denied ever wearing a knee brace before the date of the accident alleged in this claim.

Claimant testified he worked for respondent for a couple more weeks after he saw Dr. Hershberger. During that time, claimant's right knee continued to swell and worsen. No more treatment was authorized at that time, so claimant went on his own to Wesley Medical Center Emergency Room on September 25, 2010. Claimant admitted he had been drinking "heavy" before he arrived at Wesley and that he was intoxicated.[8] Claimant told the personnel at Wesley that he had been "hit by a bobcat."[9] Claimant complained that his right knee hurt. Plain x-rays of the right knee revealed no abnormality. Claimant was diagnosed with a right knee contusion and was provided with prescription strength ibuprofen.

However, while at Wesley Medical Center on the September 25, 2010, ER visit, claimant also complained of "midline neck tenderness."[10] A cervical collar was applied and a CT scan of the cervical spine was conducted, which was normal. Claimant was

---

[5] *Id.*, at 12, 25.

[6] *Id.*, Cl. Ex. 1.

[7] *Id.,* at 13.

[8] *Id.*, at 27, 28.

[9] *Id.*, Cl. Ex. 2.

[10] *Id.*

diagnosed with a cervical strain and was provided with Lortab. The Wesley records contain no history regarding the development of claimant's cervical complaints. Claimant does not allege injury to the cervical spine in this claim.

Claimant testified that at Wesley on September 25, 2010, he told the truth about what happened to his right knee. Claimant's employment was terminated by respondent at some point in September 2010, and he now works for another employer, Quikrete Company.

Bobby Darrell Rice testified by deposition. He identified himself as the superintendent or area manager for respondent. He was not present at the job site when the alleged accident occurred. On the same day as the alleged accident, Mr. Rice received a call from Scott Whelan, who told him there had been an accident at the job site.[11] Mr. Rice drove to the job site, picked up claimant, and drove him to the urgent care clinic. Mr. Rice denied ever telling claimant to tell any health care provider that the injury was not work related. Mr. Rice had no idea why claimant provided Dr. Hershberger with the history he did.[12] Mr. Rice admitted paying for the clinic bill in the amount of $229 with his personal credit card. Mr. Rice explained that respondent reimbursed him that amount after an expense report was filed.

Quincy T.H. Maxwell also testified by deposition. He is a skilled equipment operator for respondent. Mr. Maxwell testified he was working with claimant on the date of the alleged accident. Mr. Maxwell was operating a backhoe. Claimant was engaged in "spotting," that is, looking into the hole being dug to make sure the backhoe did not damage a water or gas line. Mr. Maxwell did not see claimant get struck by the backhoe and does not believe he hit claimant with the bucket. According to Mr. Maxwell, he heard claimant "moaning and groaning"[13] (apparently over the sound of the backhoe) and saw claimant lying on the ground. Mr. Maxwell thought claimant was joking at first. While claimant was still on the ground, Mr. Maxwell saw him remove his hard hat and throw it into the grass. Mr. Maxwell said that after he got down from the backhoe, he yelled at a foreman, Dennis Menefee.

Mr. Maxwell believes he did not strike claimant with the backhoe because: (1) the dirt pile from the digging was on the opposite side of the hole from where claimant was standing; (2) if the bucket would have swung toward claimant, it would have crushed claimant between the bucket and the tree; and (3) in Mr. Maxwell's estimation, if claimant

---

[11] The testimony of claimant and the records from the urgent care clinic indicate that claimant was seen at the clinic on September 3, 2010, the day following the alleged accident.

[12] Rice Depo. at 7, 8.

[13] Maxwell Depo. at 11.

would have been struck by the bucket, it would have hit claimant's left side, not the right.[14] Mr. Maxwell admitted he did see claimant limping after the accident but also testified he saw claimant walking without a limp after the accident. Mr. Maxwell also testified that after the September 2, 2010, accident, he saw claimant walk and work at claimant's home without apparent injury.[15]

Mr. Maxwell testified that claimant had injured his right knee before the alleged accident in this claim. Mr. Maxwell's recollection is that he was told by claimant that he injured his right knee when working for respondent before the September 2010 incident.[16] Specifically, claimant told Mr. Maxwell that his previous right knee injury occurred when claimant jumped into a hole and twisted his knee. The location of this event was in Rose Hill, Kansas. Mr. Maxwell did not testify that he observed claimant limp before September 2, 2010. Mr. Maxwell also insisted that he saw claimant wear a brace on his right knee "[e]very day"[17] before September 2, 2010, both at work and on social occasions. Mr. Maxwell claimed to have seen claimant put the brace on at claimant's home.[18]

No medical or claim records were offered into evidence to corroborate Mr. Maxwell's testimony about the alleged previous right knee injury, nor did any other employee of respondent testify that claimant was injured or wore a knee brace prior to the alleged accident.

When Mr. Maxwell was asked, over objection, whether claimant had a reputation for honesty, Mr. Maxwell replied, "[i]n my opinion, I don't know him, like, far as his honesty wise *[sic]*, but I'd say no."[19]

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[20]

---

[14] *Id.*, at 15, 16.

[15] *Id.*, at 22, 23, 57, 58.

[16] There are references in the record to Miller Paving & Construction, LLC, and KC United, LLC. They appear to be used interchangeably as names for respondent.

[17] Maxwell Depo. at 6, 7.

[18] *Id.,* at 6.

[19] *Id.,* at 20.

[20] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[21]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[22]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[23]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[24]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[25]

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[26] Moreover, this review of a

---

[21] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[22] K.S.A. 2010 Supp. 44-501(a).

[23] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[24] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[25] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[26] K.S.A. 2011 Supp. 44-534a.

preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[27]

ANALYSIS

There are good reasons to question the credibility of the testimony offered by both claimant and respondent.

Claimant's testimony that he had no prior right knee injuries or treatment is contradicted by the testimony of Mr. Maxwell. Claimant's description of the accident does not square with what Mr. Maxwell testified. Mr. Rice's testimony is inconsistent with claimant's testimony regarding what, if anything, Mr. Rice told claimant to tell Dr. Hershberger. Mr. Rice's testimony, however, is suspect because he paid for claimant's visit to the urgent care clinic with his personal credit card, rather than have the urgent care staff send their invoice to the workers compensation carrier or to respondent. Mr. Rice's payment of the urgent care clinic's bill with his personal credit card lends some credence to claimant's testimony that he was instructed by Mr. Rice to characterize his injury as unrelated to work.

The testimony of Mr. Maxwell also lacks credibility. Mr. Maxwell testified that the backhoe he was operating did not strike claimant's right knee, but Mr. Maxwell admitted he did not see claimant fall and that claimant was in fact limping after the alleged accident. Mr. Maxwell's testimony about claimant's previous right knee injury and claimant's everyday use of a knee brace seems improbable when: (1) no medical records were offered into evidence documenting any right knee injury before this claim arose; (2) no workers compensation documents, from the Division or elsewhere, concerning claimant's prior alleged work-related knee injury were offered into evidence; and (3) no other employee of respondent provided testimony that claimant sustained a right knee injury or wore a right knee brace before the alleged injury.

Mr. Maxwell's opinion about claimant's general reputation regarding honesty was completely gratuitous and, as the witness admitted, was based on nothing. Moreover, Mr. Maxwell admitted on cross-examination that claimant did not wear the previous knee brace on the outside of his pants, but that he (Mr. Maxwell) could see it when claimant rolled up his pants at lunch breaks. Mr. Maxwell's testimony that the brace could be seen underneath claimant's pants adds to the concerns about his credibility.

Claimant contends that the ALJ was in an advantageous position to judge claimant's credibility as a witness and that her apparent belief of claimant's testimony should be provided deference by the Board. The Board at times has accorded some deference to

---

[27] K.S.A. 2011 Supp. 44-555c(k).

the decision of an ALJ when he or she actually observes a witness or witnesses testifying. However, when a claim is properly before the Board for review, the Board generally has de novo jurisdiction of all issues, including the credibility of testimony and other evidence. "Credibility of witnesses is generally a significant issue in all fact determinations in a workers compensation claim. Nonetheless, by statute the Board always conducts a de novo review of the facts, as well as the law."[28]

Under the circumstances of this claim, in which much of the testimony is of questionable credibility, the documents admitted into evidence, and the objective details they provide, can be of particular importance.

Claimant's history provided on his first receipt of medical treatment, only one day after the alleged accident, is wholly inconsistent with the accidental injury described in claimant's sworn testimony. According to the records of Dr. Hershberger, claimant denied he sustained a work-related injury. He told the medical personnel on that date that he was carrying wood downstairs when he missed a step and fell, hitting his knee on a piece of pipe. Claimant admitted that the history he provided was false.

Claimant testified that he went to Wesley Medical Center on September 25, 2010, because his right knee was getting "worse and worse."[29] However, claimant's complaints to the medical personnel at Wesley reflected symptoms to the cervical spine at least as significant as the knee, if not more so.

Photographs of the site of the alleged accident were offered into evidence at the May 3, 2011, preliminary hearing and at the deposition of Mr. Maxwell. Both claimant and Mr. Maxwell marked on the photographs where claimant was standing before the alleged accident and where he was lying after the event. Without going into a detailed description of what is depicted in the photographs, the undersigned Board Member finds that claimant's location before the fall and the relative position of the backhoe render it very improbable that claimant was struck in the right knee by the bucket of the backhoe in the manner he claims.

This member of the Appeals Board finds that claimant has not satisfied his burden to prove by a preponderance of the credible evidence that he sustained personal injury by accident arising out of and in the course of his employment with respondent and that the claim must accordingly be denied.

---

[28] *Butner v. Glazers Wholesale Drug Co.*, No. 1,048,515, 2011 WL 2693253 (Kan. WCAB June 16, 2011).

[29] P.H. Trans. (May 3, 2011) at 14.

CONCLUSION

WHEREFORE, the undersigned Board Member finds that the January 24, 2012, preliminary hearing Order entered by ALJ Barnes is hereby reversed.

IT IS SO ORDERED.

Dated this ____ day of May, 2012.

HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
fdesk@ksworkcomplaw.com; larry@ksworkcomplaw.com

Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
timothy.emerson@thehartford.com; denise.allen@thehartford.com

Nelsonna Potts Barnes, Administrative Law Judge